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Nos. 15-1503, 15-1504

In the
Supreme Court of the United States

CHARLES S. TURNER, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

RUSSEL L. OVERTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *Brady v. Maryland*, this Court announced that it violates due process when the prosecution fails to disclose material information favorable to the accused. 373 U.S. 83, 87 (1963). The question presented is whether Petitioners' convictions must be set aside under *Brady*.

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STATEMENT OF INTEREST[1]

Founded in 1977, *amicus curiae* Cato Institute is a nonpartisan public policy research organization dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato established the Center for Constitutional Studies in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central concern to Cato because the decision below threatens to erode the constitutional right to a fair trial enshrined in the Due Process Clause of the Fifth Amendment.

SUMMARY OF ARGUMENT

I. In its seminal decision in *Brady v. Maryland*, this Court held that a State violates due process if it withholds "material" evidence favorable to the accused. 373 U.S. 83, 87 (1963). The Court subsequently clarified that "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's Office.

The lower court in this case severely misapplied *Brady*'s materiality standard. According to the D.C. Court of Appeals, evidence that contradicts "the basic structure of how the crime occurred" is material under *Brady* only if there is "a reasonable probability that [such] evidence ... would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Turner v. United States*, 116 A.3d 894, 926 (D.C. 2015). That heightened standard is contrary to this Court's repeated teachings in *Brady* and its progeny. Indeed, the decision below gets things exactly backwards: when the evidence in question concerns something as central as the *manner in which the crime was committed*, that should, if anything, counsel in favor of a less-demanding materiality standard, not a heightened one.

Unfortunately, the decision below is nothing new. For years, lower courts have been attempting to raise the threshold for materiality under the *Brady* doctrine, and this Court has repeatedly found it necessary to intervene to ensure that *Brady* remains a meaningful protection against prosecutorial overreach. This case represents yet another attempt to depart from *Brady*'s constitutional requirement by ratcheting up the materiality standard. The outcome should be the same as in the many previous cases in which this Court reversed attempts to artificially narrow the *Brady* doctrine.

II. The D.C. Court of Appeals' heightened materiality standard has implications far beyond the present case. *Brady* violations, by nature, are

difficult to detect: Defendants must show that prosecutors withheld material evidence, which by definition requires defendants to discover that which has been concealed from them. Moreover, in light of the absolute immunity enjoyed by prosecutors for claims brought under 42 U.S.C. §1983, a vigorous application of the *Brady* doctrine is the only meaningful check against the unconstitutional withholding of exculpatory evidence. Especially in borderline cases, the D.C. Court of Appeals' heightened materiality standard for evidence of "how the crime occurred" may encourage prosecutors to err on the side of withholding such evidence when *Brady* and its progeny would otherwise require disclosure. In all events, *Brady* seeks more than just outcomes; its primary function is to expose truth. The D.C. Court of Appeals deviated from that principle, and its decision will make it far more difficult to detect and root out prosecutorial misconduct.

If allowed to stand, the D.C. Court of Appeals' misapplication of *Brady* would also upend the incentive scheme created by that decision. An extensive body of empirical research has found that *Brady* violations occur with alarming regularity. Yet the decision below further opens the door to such violations by making it, in the D.C. Court of Appeals' own words, "quite difficult" to overturn convictions via *Brady*. This Court should avoid that constitutionally dubious result and reverse the decision below.

ARGUMENT

I. The Decision Below Misinterprets *Brady v. Maryland* And Its Progeny.

The lower court's opinion, while claiming reliance on this Court's precedent, all but rewrites *Brady* and its progeny. Specifically, the D.C. Court of Appeals narrowed the circumstances in which convictions will be overturned for prosecutorial nondisclosure. In so doing, the court misconstrued *Brady* and subverted the incentive structure affixed by that decision. Reflecting the Constitution's overriding concern "that justice shall be done in all criminal prosecutions," *Cone*, 556 U.S. at 451 (citation omitted), *Brady* was designed to, among other things, safeguard against the withholding of exculpatory evidence. The D.C. Court of Appeals' decision undermines that objective and undercuts the sole meaningful protection against prosecutorial misconduct in withholding evidence favorable to the accused.

A. The Decision Below Departs from *Brady* by Artifically Heightening the Threshold for Materiality.

In *Brady v. Maryland*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court has since instructed that favorable evidence is "material" for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). In this regard, a defendant seeking relief under *Brady* need not show that he "more likely than not" would have been acquitted had the withheld evidence been disclosed. *Smith v. Cain*, 565 U.S. 73, 75 (2012). Instead, the defendant must show only that the withheld evidence "'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

The decision below, however, announced a drastic change to that seemingly settled doctrine by applying a standard for materiality that bears little resemblance to the standard set forth in *Kyles* ("undermines confidence in the outcome of the trial"). According to the D.C. Court of Appeals, when withheld evidence undermines "the basic structure of how the crime occurred," a showing of materiality under *Brady* "requires a reasonable probability that [such] evidence ... would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Turner*, 116 A.3d at 926.

If allowed to stand, the decision below would significantly heighten the threshold for *Brady* materiality when withheld evidence contradicts the way in which a crime occurred. That much is evident from the D.C. Court of Appeals' own opinion: "This makes the burden on appellants to show materiality quite difficult to overcome." *Id.* at 926. But that approach to materiality under *Brady* gets things exactly backwards: when the evidence at issue goes to the central question of the manner in which the crime occurred—or, as in this case, *the identity of the*

person who committed the crime—the standard of materiality should, if anything, be *lower*, not higher. This is precisely the type of evidence that is *most likely* to be useful to the defendant as he prepares his defense.

Central to the reasoning of *Brady* is the notion that an overly high bar for materiality undermines the "truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976). Indeed, in developing the *Brady* materiality rule, this Court has been careful "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440. To that end, the Court has routinely rejected a demanding definition of materiality. *See, e.g.*, *Smith*, 565 U.S. at 75-76 ("A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'") (citation omitted); *Kyles*, 514 U.S. at 434-35 (materiality "is not a sufficiency of evidence test"); *Agurs*, 427 U.S. at 111 ("[T]he defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.").

The rationale underlying this Court's understanding of materiality is no less applicable where, as here, the withheld evidence pertains to "the basic structure of how the crime occurred." *Turner*, 116 A.3d at 926. As Petitioners maintain,

"[t]he suppressed evidence in this case is of a type and importance that is rarely seen in criminal trials." Pet. Br. 27. Evidence of "how the crime occurred" is central to the guilt or innocence of criminal defendants, and thus fundamental to the "truth-seeking function of the trial process," *Agurs*, 427 U.S. at 104.

Yet the D.C. Court of Appeals took precisely the opposite tack by imposing an artificially high materiality standard for *only* this one category of highly relevant evidence. That carve-out makes no sense on its own terms and cannot be squared with this Court's long line of *Brady* decisions.[2]

B. This Court Has Been Vigilant in Ensuring That Lower Courts Do Not Improperly Raise the *Brady* Materiality Standard.

The D.C. Court of Appeals' departure from *Brady* and its progeny is unfortunately not an aberration. The decision below is just the most recent in a long

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[2] As Petitioners explain, the lower court departed from the *Brady* line of cases in other ways as well. For example, "the [D.C.] Court of Appeals' decision is rife with speculation emphasizing 'reasons a juror might disregard' the suppressed evidence in this case." Pet. 22 (citation omitted); *see also Smith*, 565 U.S. at 76 (rejecting the State's argument that materiality should hinge on what "the jury could have disbelieved," rather than what the jury "would" have disbelieved). Moreover, the decision below "failed to meaningfully engage in a cumulative analysis of the withheld evidence in the context of the existing evidentiary record." Pet. 23; *see also Kyles*, 514 U.S. at 421 ("[T]he state's obligation under *Brady* ... turns on the cumulative effect of all ... evidence suppressed by the government").

line of attempts by lower courts to heighten the *Brady* materiality standard. This Court found it necessary to reverse the lower court in each of those cases, and should do so again here.

1. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the petitioner sought federal habeas relief following his conviction for first-degree murder. The petitioner argued, among other things, that the State obtained the conviction in violation of *Brady*. According to the petitioner, the prosecution failed to disclose various eyewitness accounts, statements made by an informant who was never called to testify, and a document listing the license plate numbers of cars parked at the crime scene on the night of the murder. *Id.* at 428-29. The Fifth Circuit denied postconviction relief on the ground that the withheld evidence was immaterial.

This Court squarely rejected the Fifth Circuit's application of the *Brady* line of cases. Notably, the Court made clear that materiality is defined "in terms of suppressed evidence considered collectively, not item by item." *Id.* at 436. In other words, "the [S]tate's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item." *Id.* at 420. The Fifth Circuit, however, had taken precisely the opposite approach, conducting "a series of independent materiality evaluations, rather than the cumulative evaluation required" by *Brady*. *Id.* at 441. The lower court's opinion "contain[ed] repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone." *Id.*

at 440. As a result, this Court reversed the judgment of the Fifth Circuit.

2. In *Smith v. Cain*, 565 U.S. 73 (2012), the petitioner sought collateral relief following his conviction for first-degree murder. The petitioner claimed that the prosecution violated *Brady* when it failed to disclose an investigator's notes stating, among other things, that the sole witness linking petitioner to the crime could not describe the perpetrator with specificity. *Id.* at 73-76. The state trial court rejected petitioner's *Brady* claim, finding that the withheld evidence was immaterial. The state appellate courts denied review.

This Court vacated the state trial court's decision, and reaffirmed that withheld evidence favorable to the accused is material under *Brady* if the evidence would "'undermine confidence in the outcome of the trial.'" *Id.* at 75-76. The Court held that the undisclosed notes were "plainly material" because the notes "directly contradict[ed]" the "only evidence linking [petitioner] to the crime." *Id.* Although the State offered a number of "reason[s] that the jury *could* have disbelieved [the] undisclosed statements," the State gave the Court "no confidence that [the jury] *would* have done so." *Id.*

3. In *Wearry v. Cain*, 136 S. Ct. 1002 (2016), the petitioner sought postconviction relief after a jury found him guilty of capital murder. The petitioner alleged that his due process rights had been violated under *Brady* when the prosecution failed to disclose several witnesses who could have corroborated the petitioner's alibi. *Id.* at 1004-05. Although the state postconviction court acknowledged that the

prosecution "probably ought to have" disclosed the withheld evidence, *id.* at 1005 (citation omitted), the court nevertheless denied relief. The Louisiana Supreme Court affirmed.

This Court reversed. Not only did the state postconviction court "improperly evaluate[ ] the materiality of each piece of evidence in isolation rather than cumulatively," but it also "emphasized reasons a juror might disregard new evidence while ignoring reasons she might not." *Id.* at 1007. "Beyond doubt," this Court opined, "the newly revealed evidence suffices to undermine confidence in [petitioner]'s conviction." *Id.* at 1006. The Court stressed that the government's evidence cannot "resemble[ ] a house of cards," such that where "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* (quoting *Agurs*, 427 U.S. at 113).

* * *

Despite this Court's repeated teachings to the contrary, a lower court has once again sought to raise the bar on the standard for disclosing *Brady* evidence. The D.C. Court of Appeals' "doubt virtually everything" standard of materiality has no basis in this Court's precedent or common sense. This Court has consistently rejected such maneuvers in past cases, and it should do so again here.

II. Raising The *Brady* Materiality Bar Would Significantly Undermine Prosecutors' Incentives To Disclose Potentially Exculpatory Evidence.

The D.C. Court of Appeals' decision to heighten the threshold for *Brady* materiality carries consequences far beyond the present dispute by upending the incentive scheme that underlies *Brady* and its progeny. If allowed to stand, the lower court's gross misapplication of *Brady* will undermine the very purpose of that doctrine—to ensure that prosecutors have powerful incentives to disclose relevant evidence favorable to the accused.

A number of recent studies have shown that, despite this Court's clear instructions about prosecutors' obligation to disclose exculpatory evidence, *Brady* violations remain unfortunately common. *See* Kathleen M. Ridolfi, Tiffany Joslyn & Todd Fries, Nat'l Ass'n of Criminal Def. Lawyers, *Material Indifference: How the Courts Are Impeding Fair Disclosure in Criminal Cases* (2014) (*available at* http://bit.ly/2jZdMlu). Put simply, "[t]here is an epidemic of *Brady* violations abroad in the land," and "[o]nly judges can put a stop to it." *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting). Yet the decision below actually *encourages Brady* violations by making it "quite difficult" to hold prosecutors accountable for withholding exculpatory evidence. That outcome is precisely what this Court's *Brady* doctrine was designed to avoid.

A. The Decision Below Undermines Prosecutors' Incentives To Disclose Potentially Exculpatory Evidence.

The D.C. Court of Appeals' infidelity to *Brady* through its adoption of a "doubt virtually everything" standard for materiality will have far-reaching consequences. Because "[t]he materiality requirement is recognized as the hallmark of the *Brady* doctrine[,]" *United States v. Wedding*, 2009 WL 3805640, at *1 (S.D. Cal. Nov. 12, 2009) (citing *Bagley*), any ratcheting-up of that standard, as in the decision below, can usher in a significant change in prosecutors' incentives to disclose, for several reasons.

1. First, the very nature of *Brady* violations renders it highly unlikely that prosecutorial misconduct will come to light in the first place. *See* Kathleen M. Ridolfi & Maurice Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* (2010) (*available at* http://bit.ly/2jH8KJn) ("*Brady* violations are, by their nature, difficult to uncover; they become apparent only when the withheld material becomes known in other ways."); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 432 (2001) ("*Brady* violations, like most other forms of illegal prosecution behavior, are difficult to discover and remedy."). *Brady* violations are almost always based on evidence outside of the trial record, and "[b]ecause direct appeals offer no opportunity to introduce such evidence, appellate courts cannot make the materiality determination necessary to

adjudicate a *Brady* claim on direct review." Anna Vancleave, *Brady and the Juvenile Courts*, 38 N.Y.U. Rev. L. & Soc. Change 551, 556 (2014).

The onus is thus on convicted defendants to raise *Brady* violations through post-conviction proceedings, where there is no right to counsel and "it is a challenge to even learn that certain evidence was never disclosed." Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash. & Lee L. Rev. 285, 299 (2016). Moreover, *Brady* does not require the discovery of exculpatory evidence before a guilty plea. *See United States v. Ruiz*, 536 U.S. 622, 628-33 (2002); *Matthew v. Johnson*, 201 F.3d 353, 361-62 (5th Cir. 2000) ("Because a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt, it follows that the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation."). And because 97% of federal convictions and 94% of state convictions result from guilty pleas (as opposed to trials), *see Missouri v. Frye*, 566 U.S. 133, 142-44 (2012) (citation omitted), prosecutors in the vast majority of cases are under no duty to disclose exculpatory evidence.

Moreover, prosecutors enjoy "absolute immunity" from liability under 42 U.S.C. §1983 for actions taken within the scope of their prosecutorial duties. *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976); *see Villasana v. Wilhoit*, 368 F.3d 976, 989 (8th Cir. 2004) ("It is logical to impose *Brady*'s absolute duty

on the government official who will present the State's case at trial, who can be expected to gather material evidence from law enforcement agencies, and who is in the best position to evaluate whether evidence must be disclosed because it is materially favorable to the defense. When acting in those capacities, the prosecutor has absolute immunity from *Brady* damage claims under §1983." (citing *Imbler*)). And, despite *Brady* violations being "one of the most common forms—if not the most common form—of prosecutorial misconduct ... discipline is rarely imposed." Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 146 & n.671, 672 (2005). Absent any tangible apprehension by prosecutors of *ex post* liability or punishment for withholding evidence, courts' faithful application of a robust *Brady* doctrine is the only sure remedy to protect defendants' due process rights and ensure that they have full access to potentially exculpatory evidence.[3]

The need for a robust *Brady* doctrine is further underscored by the strong institutional incentives that may deter prosecutors from disclosing evidence

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[3] Of course, prosecutors may be subject to criminal liability or sanctions as a result of violating ethical standards. *See* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 Ind. L.J. 481, 491 (2009) ("*Brady* violations warrant not only professional discipline, but also civil and even criminal liability."); *see, e.g.*, *In re Brophy*, 83 A.D.2d 975 (1981) (upholding criminal conviction and fine for the "misdemeanor of willfully depriving an individual of rights secured to him by the United States Constitution"). But the likelihood of such sanctions is exceedingly rare, even in cases involving flagrant *Brady* violations.

favorable to defendants. Chief among them, prosecutors are often under immense pressure to obtain high conviction rates. *See* Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Geo. L.J. 1509, 1531 n.137 (2009); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789, 828 (2000) ("[P]rosecutors, who are rewarded for high conviction rates, will adopt a 'conviction psychology' rather than internalizing the 'do justice' standard."); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2472 (2004); *see* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 903 & n.177 (2009); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 156 (2004). Especially in close cases, those structural incentives may lead prosecutors to err on the side of withholding rather than disclosing even potentially relevant evidence.

2. Against this backdrop—in which there is little direct accountability for failing to disclose relevant evidence to the defendant—*Brady* acts as a critical safeguard on criminal defendants' right to a fair trial. *See Connick v. Thompson*, 563 U.S. 51, 105 (2011) (Ginsburg, J., dissenting) (*Brady* "is among the most basic safeguards brigading a criminal defendant's fair trial right."). The "message of *Brady* and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks

victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986).

Brady, moreover, focuses on system-wide incentives and applies "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87; *see Agurs*, 427 U.S. at 110 (the "constitutional obligation" under *Brady* is not "measured by the moral culpability, or the willfulness, of the prosecutor"). This blanket protection exists because "even virtuous prosecutors trying to do justice can err in their good-faith attempts to apply the doctrine on its own terms." Burke, *supra* note 3, at 488. Indeed, "the all-too-human tendency to dismiss or discredit conflicting evidence is easily understood." John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 228-29 (2013); *see id.* at 228 ("*Brady* requires not only that zealous prosecutors help the opposition, but that they do so by crediting a version of the evidence at odds with their understanding. Both common sense and cognitive psychology confirm the difficulty of that task."). Thus, erring on the side of disclosing potentially relevant evidence "will hardly injure the judicial process. Indeed, it will help it." *Imbler*, 424 U.S. at 443 (White, J., concurring).

B. The Decision Below Is Especially Troubling in Light of the Frequency with which *Brady* Violations Occur.

An extensive body of empirical research concerning the frequency of *Brady* violations further underscores that the decision below, if allowed to stand, may have unsettling and far-reaching consequences. As noted above, research shows that

Brady violations are among the most common forms of prosecutorial misconduct. *See* Johns, *supra*, at 146; Davis, *supra*, at 431. Moreover, studies reveal that *Brady* violations "often occur in the same prosecutor's office, are often committed by the same prosecutor," and "occur disproportionately in capital cases." Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for* Brady *Violations*, Amicus, Harv. Civ. Rights-Civ. Lib. L. Rev. 12-13 (2010) (*available at* http://bit.ly/2kXxlvg).

In one such study, the *Chicago Tribune* surveyed 11,000 homicide convictions between 1963 (the year this Court decided *Brady*) and 1999. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, Chi. Tribune, at 3 (Jan. 10, 1999, http://trib.in/2kwn7E7). Of those convictions, "at least" 381 were "thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false." *Id.* at 1. The *Tribune* ultimately determined that "prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases." *Id.* The study also made clear that the 381 overturned convictions "represent[ ] only a fraction of how often such cheating occurs." *Id.*; *see also* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 869 (1997) (asserting that "we have every reason to suspect that there are many more [*Brady* violations] in which the prosecutor's refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney").

The *Tribune*'s findings accord with other empirical inquiries into the prevalence of *Brady* violations. *See, e.g.*, California Commission on the Fair Administration of Justice, *Report and Recommendations on Reporting Misconduct*, at 3 (2007) (locating 2,130 California cases in which claims of prosecutorial misconduct were raised and finding misconduct in 443, the majority of which involved the suppression of exculpatory evidence); Steven Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?*, Ctr. for Pub. Integrity (June 26, 2003), http://bit.ly/2l0rVii (reviewing 11,452 cases in which allegations of prosecutorial misconduct were scrutinized by appellate courts and finding reversible misconduct—primarily for *Brady* violations—in 2,012 decisions); James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 5 (2000) (reporting that prosecutorial withholding of evidence accounted for sixteen to nineteen percent of reversible errors in capital cases); Bill Moushey, *Hiding the Facts: Discovery Violations Have Made Evidence Gathering a Shell Game*, Pittsburgh Post-Gazette, at A-1 (Nov. 24, 1998) (conducting a two-year investigation into 1,500 allegations of prosecutorial misconduct and uncovering "hundreds of examples of discovery violations in which prosecutors intentionally concealed evidence that might have helped prove a defendant innocent or a witness against him suspect").

The results of these studies are anything but an anachronistic trend. In fact, the federal and state reporters confirm that in recent years *Brady* violations have remained a particularly acute

problem for our criminal justice system. *See, e.g.*, *Wearry*, 136 S. Ct. at 1002; *Smith*, 565 U.S. at 73; *United States v. Sedaghaty*, 728 F.3d 885 (9th Cir. 2013); *Aguilar v. Woodford*, 725 F.3d 970 (9th Cir. 2013); *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2010); *Simmons v. Beard*, 590 F.3d 223 (3d Cir. 2009); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009); *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009); *United States v. Zomber*, 299 F. App'x 130 (3d Cir. 2008); *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149 (2d Cir. 2008); *United States v. Avilés-Colón*, 536 F.3d 1 (1st Cir. 2008); *People v. Uribe*, 76 Cal. Rptr. 3d 1457 (Cal. Ct. App. 2008); *Miller v. United States*, 14 A.3d 1094 (D.C. 2011); *Deren v. Florida*, 15 So.3d 723 (Fla. Dist. Ct. App. 2009); *Walker v. Johnson*, 646 S.E.2d 44 (Ga. 2007); *Aguilera v. Iowa*, 807 N.W.2d 249 (Iowa 2011); *DeSimone v. Iowa*, 803 N.W.2d 97 (Iowa 2011); *Kentucky v. Bussell*, 226 S.W.3d 96 (Ky. 2007); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010); *Duley v. Missouri*, 304 S.W.3d 158 (Mo. Ct. App. 2009); *People v. Garrett*, 106 A.D.3d 929 (N.Y. App. Div. 2013); *Pena v. Texas*, 353 S.W.3d 797 (Tex. Crim. App. 2011); *In re Stenson*, 276 P.3d 286 (Wash. 2012); *West Virginia v. Youngblood*, 650 S.E.2d 119 (W. Va. 2007).

* * *

Given the alarming regularity of *Brady* violations, it is critical for this Court to reverse the decision below and reaffirm that evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different." *Bagley*, 473 U.S. at 682. Indeed, "[a] robust and rigorously enforced *Brady* rule is imperative" in light of the "epidemic of *Brady* violations abroad in the land." *Olsen*, 737 F.3d at 626, 630 (Kozinski, J., dissenting). As discussed above, the core purpose of the *Brady* doctrine is to create the proper system-wide incentives for prosecutors to disclose material evidence. Unfortunately, the D.C. Court of Appeals charted the opposite course and imposed an artificially heightened materiality standard that will make *Brady* cases exceptionally difficult to win, even when—indeed, *especially* when—the evidence relates to the fundamental nature of how the crime occurred.

If allowed to stand, the decision below would dramatically skew the incentive structure created by the *Brady* doctrine, undermine prosecutorial accountability, and encourage nondisclosure in close cases. That rule is not faithful to this Court's precedents and has nothing to recommend it.

CONCLUSION

For the foregoing reasons, and those advanced by Petitioners, this Court should reverse the judgment of the D.C. Court of Appeals.

Respectfully submitted,

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